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No. 99-1884

In The

Supreme Court of the United States

LACKAWANNA COUNTY DISTRICT ATTORNEY;
THE ATTORNEY GENERAL OF THE
COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

vs.

EDWARD R. COSS, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

SHOULD A STATE PRISONER BE DEEMED "IN CUSTODY IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES" WHEN HE CHALLENGES THE SENTENCE HE CURRENTLY SERVES ON THE GROUND THAT IT WAS AFFECTED BY A PRIOR CONVICTION THAT IS CONSTITUTIONALLY UNRELIABLE DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL?

TABLE OF CONTENTS

Page

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Constitutional Provision and Statute Involved 1

Statement of the Facts 2

1. The 1986 Simple Assault Conviction 3

2. The 1990 Aggravated Assault Conviction 4

3. The Federal Habeas Corpus Petition 5

4. Resolving a Circuit Split 7

Summary of the Argument 8

Argument: 9

A STATE PRISONER SHOULD BE DEEMED "IN CUSTODY IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES" WHEN HE CHALLENGES THE SENTENCE HE CURRENTLY SERVES ON THE GROUND THAT IT WAS AFFECTED BY A PRIOR CONVICTION THAT IS CONSTITUTIONALLY UNRELIABLE DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL 9

1. This Court has Recognized a Due Process Interest in Reliability at Sentencing 11

2. This Case Illustrates Why the *Tucker* Rule Should Apply Generally to Constitutional Infirmities Which Undermine the Reliability of Prior Convictions Used to Enhance a Subsequent Sentence 17

TABLE OF CONTENTS – Continued

Page

3. The Petitioner's Proposals to Narrow the Scope of Post-Conviction Collateral Challenges are at Odds with Controlling Constitutional Principles 20

4. Non-*Gideon*, *Tucker*-Type Habeas Claims are Compatible with the Interest in State-Federal Comity 25

Conclusion 31

TABLE OF AUTHORITIES

Page

CASES

Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258 (1967) ...*passim*

Clawson v. United States, 52 F.3d 806 (9th Cir.), cert. denied, 516 U.S. 897 (1995) 7

Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546 (1991) 26

Commonwealth v. Ahlborn, 548 Pa. 544, 699 A.2d 718 (1997) 27, 28

Commonwealth v. Coss, 695 A.2d 831 (Pa. Super. 1997) 4

Coss v. Lackawanna County District Attorney, 204 F.3d 453 (3rd Cir. 2000) (*en banc*) 6

Custis v. United States, 511 U.S. 485, 114 S.Ct. 1732 (1994) ..... *passim*

Earthy Daniels v. United States, No. 99-9136 .....7, 20, 21, 22, 24

Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558 (1982) ...26, 28

Garlotte v. Fordice, 515 U.S. 39, 115 S.Ct. 1948 (1995) 30

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963) ..... *passim*

Gray v. Netherland, 518 U.S. 152, 116 S.Ct. 2074 (1996) 27

Lewis v. United States, 445 U.S. 55, 100 S.Ct. 915 (1980) 15, 16, 22, 23

Loper v. Beto, 405 U.S. 473, 92 S.Ct. 1014 (1972) 12, 13, 15, 16, 22, 23

TABLE OF AUTHORITIES – Continued

Page

Maleng v. Cook, 490 U.S. 488, 109 S.Ct. 1923 (1989) (per curiam) 8, 9, 10, 13, 14

Nichols v. United States, 511 U.S. 738, 114 S.Ct. 1921 (1994) 17

Parke v. Raley, 506 U.S. 20, 113 S.Ct. 517 (1992) 30

Partee v. Hopkins, 30 F.3d 1011 (8th Cir. 1994), rehearing *en banc* denied, 35 F.3d 365, cert. denied, 513 U.S. 1166 (1995) 7

Ryan v. United States, 214 F.3d 877 (7th Cir. 2000), petition for certiorari filed (Oct. 10, 2000) (No. 00-6554) 7

Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252 (1948) 13

Turner v. United States, 183 F.3d 474 (6th Cir. 1999), cert. denied, 120 S.Ct. 1255 (2000) 7

United States v. Clark, 203 F.3d 358 (5th Cir. 2000), petition for certiorari filed (July 21, 2000) (No. 00-122) 7

United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589 (1972) ..... *passim*

Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977) 22

Waley v. Johnston, 316 U.S. 101, 62 S.Ct. 964 (1942) 22

Young v. Vaughn, 83 F.3d 72 (3rd Cir.), cert. denied, *Abraham v. Young*, 519 U.S. 944 (1996) 7

STATUTES

18 U.S.C. §924(e) 16

28 U.S.C. §1254(1) 1

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. §2254(a) ..... *passim*

28 U.S.C. §2255 ..... 8, 12

CONSTITUTIONAL PROVISIONS

Pennsylvania Post Conviction Hearing Act, 42 Pa. Cons. Stat. §9541, et seq. (amended 1988) 3

United States Constitution, Amendment IV 24

United States Constitution, Amendment VI ... 2, 11, 15, 23

United States Constitution, Amendment XIV 1, 11

GUIDELINES

Pennsylvania Sentencing Guidelines, 204 Pa. Code §303.1 et seq., reprinted in Purdon's Pennsylvania Consolidated Statutes Annotated after 42 Pa.C.S.A. §9721 ..... 4, 5

MISCELLANEOUS

D. Brian King, *Sentence Enhancement Based on Unconstitutional Prior Convictions*, 64 New York University Law Review 1373, 1389-1397 (December 1989) 24

Paul D. Leake, *Limits to the Collateral Use of Invalid Prior Convictions to Enhance Punishment for a Subsequent Offense*, 19 Columbia Human Rights Law Review 123, 149 (Fall 1987) 24

OPINIONS BELOW

The *en banc* opinion of the court of appeals is reprinted in the Petition for Writ of Certiorari at page 1a, and is published at 204 F.3d 453. The unpublished memorandum and opinion of the district court is reprinted in the Petition for Writ of Certiorari at page 95a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 29, 2000 (Cert. Pet. 2a). The petition for writ of certiorari was filed on May 24, 2000, and was granted on October 10, 2000. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Due Process Clause

The due process clause at section one of the Fourteenth Amendment provides that "[n]o state shall . . . deprive any person of life, liberty or property without due process of law . . . "

Habeas Statute

The federal habeas corpus statute at 28 U.S.C. §2254(a) provides as follows:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf

of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE FACTS

Respondent Edward R. Coss, Jr., is currently serving a sentence of six to twelve years imprisonment following his 1990 Pennsylvania conviction for aggravated assault (JA 62a). At sentencing for this offense, the state court judge took into consideration a prior Pennsylvania conviction for simple assault (Cert. Pet. 10a-11a). Upon consideration of testimony presented at a federal habeas corpus evidentiary hearing, both the district court and the court of appeals found that Mr. Coss had met his burden of proving that the prior conviction for simple assault was obtained in violation of the Sixth Amendment right to effective assistance of counsel (Cert. Pet. 16a-22a). In addition, the court of appeals granted conditional habeas relief, finding that a reasonable probability existed that Mr. Coss would have been found not guilty if counsel at the simple assault trial had subpoenaed available exculpatory witnesses (Cert. Pet. 18a-19a). Because the prior unconstitutional conviction affects the sentence currently being served, Mr. Coss asserts that he is "in custody in violation of the Constitution of the United States" under 28 U.S.C. §2254(a). He therefore requests that the judgment of the court below, conditionally granting habeas relief, be affirmed.

1. The 1986 Simple Assault Conviction

On June 25, 1986, local police in Dickson City, Pennsylvania, acting in response to telephoned complaints, arrived at the scene of a rowdy high school graduation party. At the scene, the police were faced with a group of intoxicated persons, one of whom punched a police officer in the head. Edward Coss, then 17 years of age, was arrested and charged with the assault. Once at the police station, he damaged the fixtures in his jail cell, leading to additional charges of institutional vandalism and criminal mischief (JA 40a-45a; Cert. Pet. 3a-4a).

On October 31, 1986, following a jury trial, Mr. Coss was convicted of simple assault, institutional vandalism and criminal mischief (JA 47a). On January 30, 1987, he received a sentence of six months to one year imprisonment for the institutional vandalism and criminal mischief, and a consecutive sentence of six months to one year imprisonment for the simple assault (JA 47a-48a).

On June 12, 1987, Mr. Coss filed a petition for relief under the Pennsylvania Post Conviction Hearing Act, 42 Pa. Cons. Stat. §9541, et seq. (amended 1988) (JA 50a; JA 39a, entries for 10/24/00 and 11/6/00). In his state post-conviction petition, Mr. Coss alleged that his attorney, an assistant public defender, had rendered constitutionally ineffective assistance at his simple assault trial. Specifically, Mr. Coss alleged that "[c]ounsel was ineffective for failure to essentially subpoena witnesses, which could have exonerated the petitioner, or favorably affected the petitioner's defense efforts at vindication." (JA 52a).

On June 23, 1987, the Lackawanna County Court of Common Pleas appointed new counsel to represent Mr.

Coss, and issued a rule to show cause why a hearing should not be granted (JA 57a). On June 29, 1987, the district attorney filed an answer to the petition (JA 59a). The county court took no further action on Mr. Coss's petition (JA 49a).

2. The 1990 Aggravated Assault Conviction

On August 30, 1989, approximately seven months after release from parole supervision for the 1986 convictions, Mr. Coss participated in a group assault upon an individual named Peter Petrovich (Cert. Pet. 6a). *See Commonwealth v. Coss*, 695 A.2d 831 (Pa. Super. 1997) (JA 61a). On September 11, 1990, following a jury trial, Mr. Coss was convicted of aggravated assault (JA 62a). On April 28, 1993, he was sentenced to six to twelve years imprisonment (JA 62a). The record reflects that the court considered the 1986 simple assault when imposing this sentence (Cert. Pet. 11a). On direct appeal, the Pennsylvania Superior Court vacated the sentence due to a possible inaccuracy in the presentence report (JA 62a). On remand, the Court of Common Pleas re-imposed the sentence of six to twelve years imprisonment, and again considered the simple assault conviction listed in the presentence report (Cert. Pet. 10a-11a) (JA 62a).

Mr. Coss did not challenge the constitutionality of the simple assault conviction when he was sentenced for the subsequent offense. As correctly noted by petitioner's amicus, Mr. Coss was sentenced under the Pennsylvania Sentencing Guidelines at 204 Pa. Code §303.1, *et seq.*, and those guidelines do not provide a mechanism for challenging the constitutionality of prior convictions (Brief of

Petitioner's Amicus, pp. 1, 13). *See* Pennsylvania Sentencing Guidelines, reprinted in Purdon's Pennsylvania Consolidated Statutes Annotated, after 42 Pa.C.S.A. §9721.

3. The Federal Habeas Corpus Petition

On September 15, 1994, Mr. Coss filed a *pro se* petition for habeas relief under 28 U.S.C. §2254 (JA 1a, Item 1). In the petition, Mr. Coss challenged his 1986 conviction for simple assault, alleging that he had received ineffective assistance from trial counsel. Additionally, in a *pro se* brief filed the same day, Mr. Coss alleged that the conviction for simple assault had been considered by the county court when imposing sentence for the 1989 aggravated assault (JA 1a, Item 3, pp. 6-7). A second amended petition, filed by the Federal Public Defender, repeated the prisoner's challenge to the 1986 simple assault conviction (JA 72a).

In retrospect, counsel for the prisoner was in error in styling the amended petition as an attack on the prior conviction, rather than an attack on the subsequent conviction for which the prisoner was in custody. The record reveals that the Commonwealth was not prejudiced by this error. The Commonwealth, in its filing of February 12, 1996, noted that the true basis of the claim was that the conviction for simple assault was alleged to have impacted the later sentence for aggravated assault (JA 14a, Item 55, par. 3). The district court applied similar reasoning at note two of its order of January 20, 1998, construing the petition as an attack on the sentence for which the prisoner was currently "in custody" (JA 22a, Item 87). *See also* District Court Memorandum of June 8, 1998 (Cert. Pet. 57a-58a).

On June 8, 1998, following an evidentiary hearing, the United States District Court for the Middle District of Pennsylvania denied the petition for writ of habeas corpus (Cert. Pet. 95a). The district court found that counsel at the 1986 simple assault trial had indeed failed to subpoena a number of exculpatory witnesses, and thus had failed to render effective assistance of counsel. The district court went on to hold that Mr. Coss was not prejudiced by the ineffectiveness. The district court granted a certificate of appealability on the ineffectiveness claim, and the prisoner filed a timely notice of appeal (JA 26a, Items 103 and 104).

The court of appeals reversed the judgment of the district court and ordered that the case be remanded with instructions to grant conditional habeas relief. *Coss v. Lackawanna County District Attorney*, 204 F.3d 453 (3rd Cir. 2000) (*en banc*) (Cert. Pet. 1a). The Third Circuit agreed with the district court that counsel had rendered ineffective assistance at the 1987 simple assault trial, but disagreed with the district court's assessment that no prejudice had resulted from the ineffectiveness. On the question of prejudice, the court of appeals concluded that "a reasonable probability exists that had counsel subpoenaed the witnesses, [Mr. Coss] would not have been found guilty of assaulting the officer (Cert. Pet. 18a-19a). On the question of relief, the court of appeals permitted the Commonwealth to choose between re-trying Mr. Coss for the 1986 simple assault or proceeding directly to resentencing on the 1989 aggravated assault, without consideration of the tainted prior conviction (Cert. Pet. 28a-29a).

4. Resolving a Circuit Split

On October 10, 2000, this Court granted the District Attorney's petition for writ of certiorari. In addition, this Court has granted certiorari in *Earthy Daniels v. United States*, No. 99-9136, a case which raises a similar issue. The decision in this case and in *Earthy Daniels* will help to resolve a circuit split regarding the effect of this Court's decision in *Custis v. United States*, 511 U.S. 485, 114 S.Ct. 1732 (1994).

In *Custis*, this Court held that with the exception of absence of counsel claims, the constitutionality of prior convictions may not be challenged at federal sentencing hearings. Four circuits have held that the rule of *Custis* is applicable in federal post-conviction proceedings, and that non-*Gideon* collateral challenges are no longer permissible. *See Turner v. United States*, 183 F.3d 474, 477 (6th Cir. 1999), cert. denied, 120 S.Ct. 1255 (2000); *Ryan v. United States*, 214 F.3d 877 (7th Cir. 2000), petition for certiorari filed (Oct. 10, 2000) (No. 00-6554); *Partee v. Hopkins*, 30 F.3d 1011, 1012 (8th Cir. 1994), rehearing denied, 35 F.3d 365 (8th Cir. 1994) (Beam, joined by Wollman and Morris, dissenting from denial of rehearing *en banc*), cert. denied, 513 U.S. 1166 (1995); *Clawson v. United States*, 52 F.3d 806, 809 (9th Cir.), cert. denied, 516 U.S. 897 (1995). Two circuits have held that the rule of *Custis* is limited to federal sentencing hearings, and that prisoners may still raise non-*Gideon* collateral challenges in federal post-conviction proceedings. *Young v. Vaughn*, 83 F.3d 72, 77-78 (3rd Cir.), cert. denied, *Abraham v. Young*, 519 U.S. 944 (1996); *United States v. Clark*, 203 F.3d 358 (5th Cir. 2000), petition for certiorari filed (July 21, 2000) (No. 00-122).

The instant case presents the collateral challenge issue from the perspective of a state prisoner seeking habeas relief under 28 U.S.C. §2254. The *Earthy Daniels* case presents the issue from the perspective of a federal prisoner seeking post-conviction relief under 28 U.S.C. §2255. In both cases, the prisoners assert that their current sentences are based, in part, upon prior convictions which are unconstitutional. Thus, in both cases, the prisoners assert that they are "in custody in violation of the Constitution of the United States."

SUMMARY OF ARGUMENT

May a state sentence be challenged in federal habeas corpus where the sentence rests upon a prior conviction which is proved to be unconstitutional? The United States Court of Appeals for the Third Circuit answered this question in the affirmative. The Third Circuit found that Mr. Coss was prejudiced by ineffective assistance of counsel at his 1986 trial for simple assault, that the sentence he currently serves was affected by the judge's consideration of the unconstitutional prior conviction, and that he had a right to conditional habeas relief. The judgment of the court of appeals is consistent with existing Supreme Court case law.

Under *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589 (1972) and *Maleng v. Cook*, 490 U.S. 488, 109 S.Ct. 1923 (1989) (per curiam), a prisoner has the right to federal post-conviction relief where he is able to show that the sentence he currently serves was affected by the sentencing court's consideration of a constitutionally unreliable

prior conviction. This Court's decision in *Custis v. United States*, 511 U.S. 485, 114 S.Ct. 1732 (1994) does not overrule *Tucker* or *Maleng;* instead, *Custis* simply holds that federal sentencing hearings are not the proper forum for litigating non-*Gideon* challenges to the constitutionality of prior convictions.

For state prisoners, the proper forum is a federal habeas corpus proceeding under 28 U.S.C. §2254. In the habeas forum, rules regarding exhaustion, procedural default and burden of proof help to assure that the interests of the states are protected. Because Mr. Coss has met the exhaustion, procedural default, and burden of proof hurdles, it is requested that the judgment of the Court of Appeals, granting conditional habeas relief, be affirmed.

ARGUMENT

A STATE PRISONER SHOULD BE DEEMED "IN CUSTODY IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES" WHEN HE CHALLENGES THE SENTENCE HE CURRENTLY SERVES ON THE GROUND THAT IT WAS AFFECTED BY A PRIOR CONVICTION THAT IS CONSTITUTIONALLY UNRELIABLE DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL.

This case concerns the due process interest in reliability at sentencing. Specifically, it concerns a state prisoner's attempt to secure federal habeas relief where the judge who sentenced him took into consideration a prior conviction which was constitutionally unreliable due to ineffective assistance of counsel. The Third Circuit held that Edward Coss, a state prisoner proceeding under

28 U.S.C. §2254, had met his burden of proving three facts: first, that his prior state conviction for simple assault was tainted by ineffective assistance of trial counsel; second, that he was prejudiced by the ineffectiveness of trial counsel; and third, that a Pennsylvania Common Pleas Court judge took this constitutionally unreliable conviction into account when imposing sentence for a subsequent offense. Reasoning that consideration of the unreliable prior conviction rendered the current sentence unconstitutional, the court of appeals granted habeas relief, permitting the Commonwealth of Pennsylvania to either retry Mr. Coss for the prior offense or to resentence him on the later offense without taking into consideration the tainted prior conviction (Cert. Pet. 28a-29a).

Petitioners, the District Attorney of Lackawanna County and the Attorney General of Pennsylvania, did not seek certiorari to challenge the circuit court's findings regarding the ineffectiveness of counsel, the prejudice resulting from that ineffectiveness, or the judge's consideration of the prior conviction at subsequent sentencing. Instead, the petitioners and their amicus advance two arguments. First, they argue that the prisoner does not meet the statutory "in custody" requirement because the sentence on the prior simple assault conviction has expired. This first contention is answered by *Maleng v. Cook*, 490 U.S. 488, 109 S.Ct. 1923 (1989) (per curiam), which holds that a prisoner meets the "in custody" requirement when the record reflects that a current or yet-to-be served sentence was affected by a constitutionally infirm prior conviction. The second argument advanced by the petitioners and their amicus is that the current sentence is valid even if it does rest upon a prior

conviction that was obtained in violation of the Constitution. On this second point, petitioners argue that the current sentence is susceptible to habeas challenge only if the prior conviction was obtained in violation of the *Gideon* right to appointed counsel. Petitioners thus invite this Court to extend its decision in *Custis v. United States*, 511 U.S. 485, 114 S.Ct. 1732 (1994) so as to preclude habeas collateral challenges on non-*Gideon* grounds, regardless of the extent to which a prior conviction may be constitutionally unreliable.

The petitioner's approach mixes sentencing apples with habeas oranges. The *Custis* limitation on collateral challenges at sentencing should not be read to foreclose relief in the habeas forum, where rules regarding exhaustion, procedural default, and burden of proof assure that the interests of the states are respected. Because there must exist some forum to vindicate the federal interest in due process at sentencing, respondent asks this Court to hold that post-conviction relief remains available where a state prisoner is able to meet his burden of proving that the sentence he currently serves was affected by the judge's consideration of a prior conviction which is constitutionally unreliable.

1. This Court Has Recognized a Due Process Interest in Reliability at Sentencing

In *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1963), this Court held that the Sixth Amendment, as applied to the states through the Fourteenth Amendment, requires the appointment of counsel for indigent defendants charged with felony offenses. In the years following

Gideon, a question arose regarding what collateral use, if any, could be made of felony convictions secured in violation of the right to appointed counsel. This Court approved the granting of post-conviction relief in three cases where collateral use was made of convictions deemed constitutionally unreliable because they were obtained in violation of *Gideon*.

First, in *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258 (1967), this Court granted habeas relief to a state prisoner where a *Gideon*-infirm prior conviction had been introduced by the state as substantive evidence in a prosecution under a Texas habitual offender statute. Second, in *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589 (1972), this Court affirmed the granting of post-conviction relief under 28 U.S.C. §2255 where a prior conviction was found to have been secured in violation of *Gideon*, and the prisoner demonstrated that the prior conviction had been considered by the district court when imposing sentence for a federal bank robbery. Third, in *Loper v. Beto*, 405 U.S. 473, 92 S.Ct. 1014 (1972) (opinion announcing judgment of the court), habeas relief was granted where a *Gideon*-infirm conviction had been used to impeach the defendant during trial cross-examination.

The decisions in *Burgett*, *Tucker*, and *Loper* rested upon due process concerns regarding the reliability of the prior convictions and the unfairness of re-imposing a prior constitutional injury. On the question of reliability, the Court was concerned that a conviction secured in violation of the *Gideon* right to counsel might not reliably reflect whether the defendant had actually committed the underlying offense, and that the sentencing court's consideration of such a conviction would cause the prisoner to be sentenced "on the basis of assumptions concerning

his criminal record which were materially untrue." *United States v. Tucker*, *supra*, 404 U.S. at 447, 92 S.Ct. at 591-92, *citing Townsend v. Burke*, 334 U.S. 736, 741, 68 S.Ct. 1252, 1255 (1948). On the question of re-imposing a prior constitutional injury, the Court was concerned that the principle of *Gideon* would be eroded if uncounseled prior convictions were used to support guilt or enhance punishment. *United States v. Tucker*, *supra*, 404 U.S. at 449, 92 S.Ct. at 593. Put another way, the court was concerned that the collateral use of a *Gideon*-infirm conviction would cause the defendant to "suffer anew" from the previous deprivation of his constitutional rights. *Burgett v. Texas*, *supra*, 389 U.S. at 115, 88 S.Ct. at 262.

The post-conviction remedy recognized in *Burgett*, *Tucker* and *Loper* has not been limited to *Gideon* claims alone. This Court's decision in *Maleng v. Cook*, 490 U.S. 488, 109 S.Ct. 1923 (1989) (per curiam), reflects how a non-*Gideon* claim may also serve as the basis for a habeas challenge to a sentence currently being served or yet-to-be served. The respondent in *Maleng*, Mark Edwin Cook, had been convicted on federal bank robbery charges and had also been convicted in state court on two counts of assault and one count of aiding a prisoner's escape. In 1985, the year he filed his federal habeas petition, Mr. Cook had begun serving his federal bank robbery sentence, but had not yet begun serving his consecutive state court sentence. In a federal petition for writ of habeas corpus, Mr. Cook challenged the constitutionality of an old 1958 Washington State conviction for robbery, alleging that the conviction was unconstitutional because he had not been given a competency hearing despite reasonable doubts regarding his fitness to stand trial. He further

alleged that the 1958 conviction had been used to enhance his sentence on the yet-to-be-served state conviction for assault and aiding escape. The federal district court dismissed the habeas petition, reasoning that because Mr. Cook had completed service of the 1958 sentence, he could no longer be considered "in custody" as required by the habeas corpus statute. The Ninth Circuit reversed, finding that Cook was "in custody" on the 1958 conviction because that conviction had been used to enhance his yet-to-be-served state sentence for assault and assisting escape.

The Supreme Court in *Maleng* affirmed the judgment of the court of appeals, but did so on grounds different from those cited by the Ninth Circuit. The *Maleng* court determined that the district court judge had been correct in concluding that the prisoner was not "in custody" on the 1958 conviction, as service of that sentence had been completed years before. The *Maleng* court went on to find, however, that Mr. Cook was "in custody" on the yet-to-be-served state sentence, because that sentence was alleged to have been enhanced by the prior constitutionally invalid conviction. *Maleng v. Cook, supra*, 490 U.S. at 493-94, 109 S.Ct. at 1926-27.

This Court's decision in *Maleng v. Cook* was, in at least three respects, consistent with the rule advanced by the respondent in the instant case. First, the "in custody" requirement was met because a sentencing judge had considered an allegedly unconstitutional prior conviction, even though the sentence on that prior conviction had been fully served. Second, there is no indication in *Maleng* that there had been any state court decision holding that the 1958 conviction was constitutionally infirm;

instead, as in the cases of *Burgett* and *Loper*, the federal habeas proceeding would itself be the forum which assessed the constitutional infirmity of the prior conviction. Third, the underlying constitutional claim was a non-*Gideon* claim, suggesting a broad application of the *Tucker* reliability principle.

This Court has recognized one exception to the *Tucker* reliability principle, applicable to status offenses where the fact of the prior conviction, rather than the reliability of the prior conviction, is deemed to be the controlling principle. In *Lewis v. United States*, 445 U.S. 55, 100 S.Ct. 915 (1980), the defendant had been convicted in federal court of being a felon in possession of a firearm. Over defendant's objections, the district court permitted the prosecutor to introduce evidence of a 1961 Florida felony conviction, even though the defendant alleged that the prior conviction had been secured in violation of *Gideon*. The federal firearms conviction was affirmed in the court of appeals, and that judgment was affirmed in the Supreme Court.

In *Lewis*, the Court reasoned that use of an uncounseled felony conviction as the basis for a civil firearms disability, enforceable by criminal sanction, was not inconsistent with *Burgett*, *Tucker* and *Loper*. The Court observed that in each of those cases, "the subsequent conviction or sentence violated the Sixth Amendment because it depended upon the reliability of a past uncounseled conviction." *Id.*, 445 U.S. at 67, 100 S.Ct. at 922. The federal gun laws, by contrast, "focus not on reliability, but on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons." *Id.* Given this discussion, the

Lewis decision should not be read as an abandonment of the *Tucker* reliability principle, but should instead be read as an exception applicable to status offenses, where the fact of conviction is the legal disability which underlies the subsequent prosecution. Simply put, the *Lewis* decision did not purport to disturb the due process reliability principle underlying *Burgett*, *Tucker* and *Loper*.

In a similar vein, this Court's decision in *Custis v. United States*, 511 U.S. 485, 114 S.Ct. 1732 (1994) should not be read as an abandonment of the *Tucker* reliability principle, or a limitation on it's applicability in habeas corpus. In *Custis*, the defendant was convicted of possession of a firearm by a convicted felon, and the government sought enhanced sentencing under the Armed Career Criminal Act at 18 U.S.C. §924(e). Mr. Custis sought to challenge the constitutionality of two of his prior convictions, alleging ineffective assistance of counsel and a constitutionally deficient guilty plea. The district court applied the ACCA enhancement, ruling that only *Gideon* challenges were cognizable at a federal sentencing hearing. The Fourth Circuit affirmed the judgment of the district court, and this Court affirmed the judgment of the Fourth Circuit.

Because *Custis* concerned the conduct of a federal sentencing hearing, the Court was not presented with the issue of whether or to what extent prisoners could use federal post-conviction proceedings to challenge a current sentence on the ground that it was affected by a prior conviction alleged to be infirm on non-*Gideon* grounds. The *Custis* dissent asserted that the majority opinion "does not disturb uniform appellate case law holding that an individual serving an enhanced sentence may invoke

federal habeas to reduce the sentence to the extent it was lengthened by a prior unconstitutional conviction." *Custis v. United States, supra*, 511 U.S. at 512, 114 S.Ct. at 1746 (dissent) (cite omitted). On this point, Justice Ginsburg, a member of the *Custis* majority, would appear to agree with the *Custis* dissenters. As reflected in a dissenting opinion in *Nichols v. United States*, 511 U.S. 738, 765, 114 S.Ct. 1921, 1937 (1994), Justice Ginsburg has suggested that *Custis* presented a "forum question" regarding "where, not whether, the defendant could attack a prior conviction for constitutional infirmity." It is submitted that Justice Ginsburg's analysis is correct.

2. This Case Illustrates Why The Tucker Rule Should Apply Generally to Constitutional Infirmities Which Undermine the Reliability of Prior Convictions Used to Enhance a Subsequent Sentence

As previously noted, this Court's decision in *Tucker* rests upon two principles of due process. The first principle is the need for reliability in criminal proceedings, and the resulting need for a mechanism to challenge the reliability of prior convictions which are used to enhance punishment. This first principle arises from the concern that a constitutionally infirm prior conviction might not reliably reflect that the prisoner actually committed the charged offense, and that a subsequent sentence should not rest upon evidence which is constitutionally unreliable. *United States v. Tucker, supra*, 404 U.S. at 447, 92 S.Ct. at 591-92. The second due process principle, the need to avoid re-imposition of constitutional injury, arises from the concern that the use of a constitutionally infirm prior conviction at a later sentencing causes the prisoner to

"suffer anew" the previous deprivation of his constitutional rights. *Id.* 404 U.S. at 499, 92 S.Ct. at 593; *Burgett v. Texas, supra,* 389 U.S. at 115, 88 S.Ct. at 262. In *Tucker,* this Court applied these principles in a federal post-conviction proceeding where the prisoner alleged that his current sentence was affected by the judge's consideration of a prior conviction obtained in violation of the *Gideon* guarantee of appointed counsel. The prosecution now seeks to limit the application of these principles to *Gideon* claims alone. The instant case demonstrates why these principles should not be so limited.

When the Pennsylvania Common Pleas Court judge sentenced Edward Coss for the 1989 assault on Peter Petrovich, that judge had every reason to believe that Mr. Coss had committed a similar assault back in 1986. As found by the court of appeals, the prior conviction was listed in the presentence report and was considered by the judge at the time sentence was imposed (Cert. Pet. 10a-11a). While it is impossible to know the extent to which the prior conviction affected the subsequent sentence, it is reasonable to infer that the effect was not favorable to the defendant.

We now know that the prior conviction for simple assault is constitutionally unreliable due to ineffective assistance of trial counsel. The public defender assigned to the case failed to subpoena several witnesses who would have testified that Edward Coss was not the person who committed the 1986 assault on the police officer. The court of appeals concluded that Mr. Coss met his burden of proving that he was prejudiced by counsel's failure to subpoena the witnesses; they further found a reasonable probability that "had counsel subpoenaed the

witnesses, [Coss] would not have been found guilty of assaulting the officer." (Cert. Pet. 18a-19a). The record therefore reflects that respondent's current sentence was affected by the judge's consideration of a prior conviction which is constitutionally unreliable. There is no principled reason to grant habeas relief where the unreliability is due to the absence of counsel, but deny habeas relief where the unreliability is due to the ineffectiveness of counsel.

Turning to the second due process principle, this case demonstrates how consideration of a constitutionally infirm prior conviction constitutes a re-imposition of the previous constitutional injury. At the time Edward Coss was sentenced for the 1989 assault on Peter Petrovich, he knew that the prior conviction for simple assault had been listed in his presentence report, and that the prior conviction would likely be taken into consideration by the judge when imposing sentence for the subsequent offense. Mr. Coss also knew that his attorney in the prior case had failed to subpoena several witnesses who could have offered exculpatory evidence. The use of the prior conviction for simple assault thus represented to the defendant a re-imposition of a previous constitutional injury. There is no principled reason to grant habeas relief where the re-imposed injury involves the absence of counsel, but deny habeas relief where the re-imposed injury involves ineffective assistance of counsel.

3. The Petitioner's Proposals to Narrow the Scope of Post-Conviction Collateral Challenges are at Odds with Controlling Constitutional Principles

The petitioners and their amicus in this case, together with the respondent and it's amicus in the case of *Earthy Daniels v. United States*, No. 99-9136, maintain that non-*Gideon, Tucker*-type claims should not be permitted in federal post-conviction proceedings. Among the arguments advanced in support of this position are the following: First, they suggest that collateral challenges should be limited to those few constitutional claims which would have come within the definition of "jurisdictional defects" under pre-1942 habeas corpus law. Solicitor General's Brief in *Earthy Daniels*, Arg. A, Sec. 1; Amicus Brief of Attorneys General, p. 18. Second, they suggest that non-*Gideon* post-conviction collateral challenges should not be permitted because the fact of prior convictions, rather than the reliability of prior convictions, is the controlling principle at sentencing. Amicus Brief of Criminal Justice Legal Foundation in *Earthy Daniels*, Amicus Brief of Attorneys General, p. 13 n.5 (noting that United States Sentencing Guidelines rely upon the "fact" of prior convictions). Third, they argue that even if reliability is a proper subject of constitutional inquiry, most prior convictions can be deemed reliable even if they are constitutionally infirm. Amicus Brief of Criminal Justice Legal Foundation in *Earthy Daniels*, pp. 11-14. Fourth, they argue that a rule permitting non-*Gideon* collateral challenges would be inconsistent with principles of state-federal comity. Brief of Petitioners, p. 21; Amicus Brief of Attorneys General, pgs. 8, 16. Respondent submits that these arguments are at odds with controlling

constitutional principles regarding habeas jurisdiction and the due process interest in reliability at sentencing.

a. The Jurisdictional Defects Theory

In *Custis*, this Court held that, with one exception, collateral attacks on prior sentences were prohibited at federal sentencing hearings. The one exception was the right to challenge a prior conviction on the ground that the defendant had been denied the right of appointed counsel as guaranteed by *Gideon*. In recognizing this exception for *Gideon* claims, the *Custis* decision noted that the failure to appoint counsel for an indigent defendant was a "unique constitutional defect" which had long been cognizable in habeas corpus, even under the restrictive "jurisdictional defect" theory of habeas jurisprudence in effect prior to the year 1942. *Custis v. United States, supra*, 511 U.S. at 496, 114 S.Ct. at 1738. Seizing upon this reference, the Solicitor General in *Earthy Daniels* and the Attorneys General in this case suggest that habeas corpus collateral attacks should now be limited only to those few claims which would have been entertained under the old "jurisdictional defect" theory of habeas corpus. Solicitor General's Brief in *Earthy Daniels*, Arg. A. Sec. 1; Amicus Brief of Attorneys General, p. 18. On this fundamental question of post-conviction judicial authority, this Court should reject the attempt to reanimate the "jurisdictional defects" theory.

The *Custis* decision creates a bright-line rule which promotes judicial efficiency by limiting the collateral challenges which may be raised in a federal recidivist sentencing proceeding. Nowhere, however, did the *Custis*

court indicate an intent to resuscitate the long-abandoned rule that only jurisdictional defects may be recognized in habeas corpus. A doctrinal shift of this magnitude would require the Supreme Court to overrule a line of case law from *Waley v. Johnston*, 316 U.S. 101, 62 S.Ct. 964 (1942), which discarded the jurisdictional defect limitation, to *Wainwright v. Sykes*, 433 U.S. 72, 79, 97 S.Ct. 2497, 2502 (1977), which noted the continued validity of *Waley*. Simply put, the fact that the *Custis* court chose to discuss the unique history of the right to appointed counsel is no justification for such an extreme change in habeas practice.

b. Reliability versus Fact of Conviction

Respondent's amicus suggests that Coss's focus on the reliability of prior convictions is misplaced, and that the Court should instead focus on the fact of prior convictions. Amicus Brief of Attorneys General, p. 13, n.5 (noting that United States Sentencing Guidelines rely upon the "fact" of prior convictions). This reliability versus fact of conviction argument requires this Court to decide which of two lines of case law is controlling in the instant case. If the due process principles of *Burgett, Tucker* and *Loper* are applied, then the reliability of prior convictions is a proper constitutional concern. If the relevant precedent is *Lewis v. United States*, 445 U.S. 55, 100 S.Ct. 915 (1980), then the fact of conviction is dispositive. A careful reading of *Lewis* reflects that it is the reliability principle, and not the fact of conviction approach, which applies when considering a habeas challenge to the constitutionality of a sentence.

As previously discussed, the defendant in *Lewis* had been convicted in federal court of being a felon in possession of a firearm. Over defendant's trial objection, the district court permitted the prosecutor to introduce evidence of a prior felony conviction, even though the defendant alleged that the conviction had been secured in violation of the *Gideon* right to counsel. The felon in possession conviction was affirmed in the court of appeals, and that judgment was affirmed in the Supreme Court.

The *Lewis* court reasoned that the use of an uncounseled felony conviction as the basis for a civil firearms disability, enforceable by criminal sanction, was not inconsistent with *Burgett, Tucker* and *Loper*. The Court observed that in each of those cases, "the subsequent conviction or sentence violated the Sixth Amendment because it depended upon the reliability of a past, uncounseled conviction." *Lewis v. United States, supra*, 445 U.S. at 67, 100 S.Ct. at 922. The federal gun laws, by contrast, "focus not on reliability, but on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons." *Id*. Thus, the *Lewis* decision recognizes that the fact of conviction is the controlling principle for status offenses, where the existence of the prior conviction is the legal disability which underlies the subsequent prosecution. Otherwise, *Lewis* reaffirms the validity of the due process reliability principle which is at the heart of *Tucker*. The due process interest in reliability at sentencing survived *Lewis*, and the existence of this principle supports the continued validity of non-*Gideon, Tucker*-type habeas claims.

c. The Purported Reliability of Constitutionally Infirm Convictions

Should this Court find that due process reliability concerns do, in fact, justify a mechanism for post-conviction collateral attacks, respondent's amicus in *Earthy Daniels* advances an alternative argument. The argument is that unconstitutional convictions are not necessarily unreliable. The Court is therefore invited to recognize a class of prior convictions which, though constitutionally infirm, are reliable enough to support an enhanced sentence for a subsequent offense. Amicus Brief of Criminal Justice Legal Foundation in *Earthy Daniels*, pp. 11-14.

On this point, the argument of respondent's amicus in *Earthy Daniels* has some support in the scholarly literature. One commentator observes that "*Tucker* relief makes sense only if a constitutional violation in obtaining the prior conviction affects the reliability of the conviction." Paul D. Leake, *Limits to the Collateral Use of Invalid Prior Convictions to Enhance Punishment for a Subsequent Offense*, 19 Columbia Human Rights Law Review 123, 149 (Fall 1987). Another commentator, collecting the case law on this point, suggests that claims which implicate the *Tucker* reliability principle include absence of counsel, ineffectiveness of counsel, involuntary guilty pleas, and improper judicial comment on the right to silence; claims not implicating the *Tucker* reliability principle include Fourth Amendment violations, convictions under statutes later determined to violate equal protection, and convictions under statutes later determined to violate due process. D. Brian King, *Sentence Enhancement Based on*

Unconstitutional Prior Convictions, 64 New York University Law Review 1373, 1389-1397 (December 1989).

In the instant case, it is unnecessary to determine which infirmities render a conviction unreliable or whether such classifications should even be recognized. Under any standard, Edward Coss's prior conviction for simple assault has been proven unreliable. He received ineffective assistance of trial counsel, and the court of appeals found that "a reasonable probability exists that had counsel subpoenaed the witnesses, [Coss] would not have been found guilty of assaulting the officer." (Cert. Pet., pp. 18a-19a). Whatever the standard, the prior conviction for simple assault is both unconstitutional and unreliable.

4. Non-Gideon, Tucker-Type Habeas Claims are Compatible with the Interest in State-Federal Comity

The fourth argument advanced by petitioners and their amicus is that continued recognition of non-*Gideon*, *Tucker*-type habeas claims would be inimical to the interest in state-federal comity. In this regard the petitioners and their amicus argue that both the states and society at large have an interest in the finality of criminal convictions. They further argue that the state's interest is impinged when federal courts pass upon the alleged constitutional infirmity of criminal convictions long thought to be final. Brief for Petitioners, p. 21; Amicus Brief of Attorneys General, pp. 15-17.

Petitioners' comity argument commands serious attention. Concerns for state-federal comity are at the

heart of much of this Court's habeas corpus jurisprudence. While this Court has recognized the value of habeas corpus as the bulwark against convictions that violate fundamental fairness, this Court has also recognized that the habeas remedy comes at a cost to the state's interest in the finality of criminal litigation. *Coleman v. Thompson*, 501 U.S. 722, 747-48, 111 S.Ct. 2546, 2563-64 (1991). For this reason, this Court has consistently expressed a sensitivity to the interests of the states when fashioning the doctrines and procedures which control the disposition of federal post-conviction claims.

While this case clearly raises issues of state-federal comity, it must be noted that this case does not implicate one of the core concerns of the comity doctrine, to-wit, that "writs of habeas corpus frequently cost society the right to punish admitted offenders." *Engle v. Isaac*, 456 U.S. 107, 127, 102 S.Ct. 1558, 1572 (1982). Here, the respondent has fully served his sentence for the 1986 simple assault; the time cannot be returned to him, even though the conviction was found to be constitutionally unreliable due to the ineffective assistance of counsel. In a similar vein, respondent does not seek to deny the Commonwealth its right to exact punishment for the 1989 assault on Peter Petrovich; under the remedy fashioned by the circuit court, Mr. Coss will be resentenced for that offense (Cert. Pet. 28a, n. 14). All that the respondent seeks is to assure that a current sentence will be reconsidered where it is shown that it rests upon a prior conviction which is constitutionally unreliable.

Even though respondent's proposed rule would not deny states the right to impose punishment, this case does raise two legitimate state-federal comity concerns.

First, the state seeks to assure that its procedural rules are respected. Second, the state seeks to assure that judicial and prosecutorial resources are not misallocated (Amicus Brief of Attorneys General, pgs. 8, 16). These comity concerns are addressed by federal post-conviction rules regarding exhaustion, procedural default, and burden of proof. Taken together, these rules assure that state procedural processes are respected, and that state prosecutors are not asked to bear an unreasonable burden of proof in habeas cases raising non-*Gideon*, *Tucker*-type claims.

a. Exhaustion

Pursuant to 28 U.S.C. §2254(b)(1)(A), an applicant for a writ of habeas corpus must establish that he has "exhausted the remedies available in the courts of the State. . . . " In applying this exhaustion requirement, the focus is upon those state court remedies available at the time the federal petition is filed. *Gray v. Netherland*, 518 U.S. 152, 161-62, 116 S.Ct. 2074, 2080 (1996). The exhaustion rule assures that state courts are given a fair opportunity, in advance of any federal litigation, to defend their judgments and address any constitutional claims.

In the instant case, the opinion of the court of appeals reflects that no state court remedies were available to Mr. Coss at the time he filed his federal petition. "As was made clear by the Pennsylvania Supreme Court in *Commonwealth v. Ahlborn*, 548 Pa. 544, 699 A.2d 718 (1997), collateral relief is not available under either the Post Conviction Hearing Act or under the common law remedies of state habeas corpus or coram nobis for a

petitioner who is not currently serving a sentence of imprisonment for the conviction he wishes to challenge, even if petitioner contends that collateral consequences stem from that conviction." (Circuit Court Opinion, Cert. Pet. 14a). Given the absence of available state court remedies, the district court and court of appeals acted properly in excusing the exhaustion requirement. *Id.* By requiring federal courts to consider the availability of state court remedies, the exhaustion rule helps to accommodate the comity concerns raised by petitioners.

b. Procedural Default

Rules regarding procedural default provide a second mechanism for protecting the comity interests which are asserted by the petitioners and their amicus. Under this judicially-created doctrine, a habeas petitioner must demonstrate that he utilized available state court procedures in the trial court and on direct appeal; in the alternative, the habeas petitioner must show cause and prejudice for his procedural default. *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558 (1982).

Questions regarding the rules of procedural default are not necessarily included within the issue presented in this case. It is nonetheless worth noting that there is an unanswered question regarding the procedural default rule as it applies to *Tucker*-type collateral challenges, to-wit, whether the prisoner's responsibilities are fulfilled when he challenges the constitutionality of the enhanced sentence in the subsequent prosecution, or whether the prisoner is also charged with the responsibility of raising his constitutional claim in the prior criminal case. The

reported case law does not discuss this issue, and the answer will control the result in most habeas cases which raise *Tucker*-type collateral challenges. It is submitted that application of the procedural default rule should be guided by the text of the habeas corpus statute, which focuses on the sentence for which the prisoner is "in custody." *See* 28 U.S.C. §2254(a). The prisoner's responsibilities should therefore be deemed fulfilled when he challenges the constitutionality of the enhanced sentence in the subsequent prosecution.

However the procedural default question is eventually resolved, the record in this case reflects that Mr. Coss would meet either formula. As noted by petitioners' amicus, the Pennsylvania Sentencing Guidelines do not provide a mechanism for challenging the constitutionality of prior convictions at subsequent sentencing hearings. Amicus Brief of Attorneys General, pgs. 7, 13. For this reason, Mr. Coss cannot be faulted for failing to raise his collateral challenge at sentencing for the Peter Petrovich assault. If the rules of procedural default are held to apply to the prior conviction, Mr. Coss would be found to have complied with that approach. While in custody for the 1986 simple assault, he filed a timely state post-conviction petition alleging that he had received ineffective assistance of counsel at trial (JA 50a-51a). It goes without saying that Mr. Coss cannot be faulted for the fact that the Court of Common Pleas of Lackawanna County failed to act on his petition, and that it was still pending seven years later when the federal petition was filed (JA 49a).

In summary, the rules of procedural default help to assure that proper deference is paid to state mechanisms

for relief in the sentencing court and on direct appeal. The existence of these rules helps to assure that the interest in state-federal comity is respected when litigating non-*Gideon, Tucker*-type claims.

c. Burden of Proof

The rules regarding the burden of proof in federal habeas corpus proceedings are another means of assuring that the interests of state-federal comity are respected. This Court has noted that "even when a collateral attack on a final conviction rests on constitutional grounds, the presumption of regularity that attaches to final judgments makes it appropriate to assign a burden of proof to the defendant." *Parke v. Raley*, 506 U.S. 20, 31, 113 S.Ct. 517, 524 (1992). Given this burden of proof, delay in the litigation of habeas corpus claims is apt to disadvantage the prisoner more than the state. *Garlotte v. Fordice*, 515 U.S. 39, 46, 115 S.Ct. 1948, 1952 (1995).

Because of the federal rule on the burden of proof in habeas corpus, it is the prisoner who must find the witnesses, the prisoner who must present the evidence, and the prisoner who must persuade the court that he has met his burden of proof. This allocation of the burden of proof is yet another way in which federal habeas corpus procedure assures that non-*Gideon, Tucker*-type claims will be addressed with due regard for the interests of the states.

To summarize, adjudication of non-*Gideon, Tucker*-type habeas claims is not inconsistent with the interest in state-federal comity. The exhaustion rule assures that states are given the initial opportunity to pass upon criminal judgments alleged to be constitutionally infirm. The

procedural default doctrine helps to assure that state procedural rules are respected, and that prisoners will be obliged to challenge the constitutionality of enhanced sentences at the earliest possible opportunity. In addition, the federal rule on burden of proof assures that the prisoner, not the state, will bear the risk that evidence or witnesses will have become unavailable. The existence of these rules permits federal courts to vindicate the due process right to reliability at sentencing, while at the same time assuring that essential state interests are protected.

CONCLUSION

WHEREFORE, it is respectfully requested that the judgment of the United States Court of Appeals for the Third Circuit be affirmed.

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